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NO. 355977

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

PALMER D. STRAND AND PATRICIA N. STRAND,

Appellants,

v.

STATE OF WASHINGTON BOARD OF TAX APPEALS, SPOKANE
COUNTY, AND SPOKANE COUNTY ASSESSORS,

Respondents.

**BRIEF OF RESPONDENT WASHINGTON STATE BOARD OF
TAX APPEALS**

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I. INTRODUCTION

Palmer and Patricia Strand (the Strands) ask this Court to reopen seven final property tax assessments which either were unsuccessfully appealed by the Strands, or were never appealed at all. Any further appellate review of these seven matters is either barred by the doctrine of *res judicata*, or barred by the Strands' failure to exhaust administrative remedies. An eighth matter, the Strands' appeal of their 2015 property tax assessment, is still pending before the Board of Tax Appeals (BTA) and thus is not ripe for this Court's review. Because there is no justiciable issue properly before the Court in this appeal, this Court should affirm the decision of the Superior Court.

II. ISSUE

Should this Court find that all of the Strands' claims as to the Spokane County Board of Tax Appeals are barred from appellate review?

III. FACTS

A. **The Strands' Appeals Of Their 2008, 2009 And 2010 Property Tax Assessments**

The Strands appealed their 2008 property tax assessment to the Spokane County Board of Equalization (BOE), then to the BTA. The BTA issued a decision in favor of Respondent Spokane County Assessor. CP 704; 711; *Strand v. Spokane County Assessor*, No. 09-121, Wash. Bd. of Tax

Appeals (June 22, 2010). CP 710. The Strands sought judicial review of the order. CP 721; *Strand v. Spokane County Assessor*, Spokane County Superior Court, Cause No. 10-2-02730-5 (December 3, 2010). CP 721. The Strands did not appeal to the Washington Court of Appeals.

The Strands also appealed their 2009 property tax assessment to the BOE (CP 724) and subsequently the BTA (CP 732), which issued a decision in favor of Defendant Spokane County Assessor. CP 754; *Strand v. Spokane County Assessor*, No. 10-258, Wash. Bd. of Tax Appeals (December 13, 2011). The Strands again sought judicial review. CP 756; *Strand v. Spokane County Assessor*, Spokane County Superior Court, Cause No. 12-2-0110-3 (June 8, 2012). The Strands sought direct review by the Washington Supreme Court. CP 761. The Supreme Court transferred the appeal to this Court, which affirmed the lower court's ruling. CP 758; *Strand v. Spokane County Assessor*, No. 31340-9, 2013 WL 6200166 (Wash. Ct. App. November 26, 2013) (unpublished).

The Strands then appealed their 2010 property tax assessment to the BOE (CP 771), and then to the BTA, which issued a decision in favor of Defendant Spokane County Assessor. CP 779; *Strand v. Spokane County Assessor*, No. 11-706, Wash. Bd. of Tax Appeals (November 15, 2013). CP 777. On judicial review, the Spokane County Superior Court dismissed the case with prejudice. CP 786; *Strand v. Spokane County Assessor*,

Spokane County Superior Court, Cause No. 13-2-04976-1 (January 27, 2014). As with their appeal of the 2008 property tax assessment, the Strands did not appeal this case to the Washington Court of Appeals.

B. The Strands Did Not Appeal Their Property Tax Assessments In 2011, 2012 And 2014

The Strands did not file an appeal of their property tax assessments for the years of 2011, 2012 and 2014 with the BOE or the BTA. CP 646.

C. The Strands' Petition For Review Arising From Their 2013 Tax Assessment

The Strands appealed their 2013 property tax assessment to the BOE, then to the BTA. While the case was pending at the BTA, the Strands filed a petition for judicial review in Spokane County Superior Court pursuant to the Administrative Procedure Act (APA). RCW 34.05.514. In their petition, the Strands alleged that the BTA had failed in its duty to provide a complete administrative real property appeal pursuant to RCW 84.08.130 by failing to issue a decision regarding their appeal of their 2013 tax assessment. CP 2. The Strands also sought an order from the superior court to implement a discovery schedule, to require the BTA to issue a decision, and for court costs. CP 6, 7. No other specific relief was sought against the BTA. CP 7.

After the Strands filed their Petition for Judicial Review on April 18, 2017, but before the superior court's hearing on the Petition was

held, the BTA issued its Initial Decision on May 9, 2017 in favor of the Strands. CP 667. No request for reconsideration or request for review of the BTA's order was filed by any party, and the Initial Decision became a Final Order on May 29, 2017. CP 649; 679. No party appealed the Final Order. CP 646.

At the subsequent hearing in Superior Court on the Strands' Petition For Review, the Strands argued that the favorable decision from the BTA as to their 2013 property tax assessment appeal should force the reopening of all of the Strands' property tax assessments from 2008 through 2016. CP 365. The Strands make the same argument in their appellate brief, asking this Court to "[o]rder the BTA to hold a hearing on the value of Pat's property for assessment years 2008 through 2012 and 2014 through 2017." Brief of Appellant, 2. In its order, the Superior Court ruled that the assessments from 2008, 2009, and 2010 had already "been fully litigated on the merits" and that the Strands failed to exhaust administrative remedies regarding the assessments for 2011, 2012, 2014, and 2016. CP 648. The court's order also noted that the Strands had appealed their 2015 and 2016 assessments to the BOE, but only appealed the 2015 assessment to the BTA. CP 647. The superior court determined that because all of those assessments (save the pending 2015 tax assessment appeal) had either been unsuccessfully appealed by the Strands, or had not been appealed at all

within the timeframe required, further review of any of those assessments was barred by the doctrine of *res judicata*, or by the failure of the Strands to exhaust administrative remedies. CP 648. The court also found that the appeal of the 2015 assessment was still pending before the BTA, and that a hearing had not yet been held. CP 646.

The court, noting that the BTA's decision in the 2013 assessment appeal had been issued during the course of the Superior Court case, remanded the issue to the BTA with instructions to take into consideration the BTA's order from the 2013 appeal when deciding the 2015 appeal. CP 649. All other prayers for relief were denied. CP 650.

D. The Strands' Appeal Of Their 2015 Assessment Is Currently Pending. The Strands' Appeal Of Their 2016 Tax Assessment Is Now Final

The Strands appealed their 2015 and 2016 assessments to the BOE. CP 688. However, they only appealed the 2015 assessment to the BTA. *Id.*; *see also* 647. The 2015 tax assessment remains pending at the BTA. The 2016 tax assessment appeal is now final, and the period for filing an appeal has closed.

IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of agency orders. *Mills v. Western Washington University*, 170 Wn.2d 903, 909, 246 P.3d 1254 (2011). "The burden of demonstrating the invalidity of

agency action is on the party asserting invalidity [.]” RCW 34.05.570(1)(a). On review of an agency decision, this Court sits in the same position as the superior court and applies the standards of the APA to the agency order and record. *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

“To reverse an administrative order, a reviewing court must find that the order (1) is based on an error of law; (2) is based on findings not supported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond the statutory authority; or (6) the agency has engaged in an unlawful procedure or decision making process or has failed to follow a prescribed procedure.” RCW 34.05.570(3); *In re Martin*, 154 Wn. App. 252, 260, 223 P.3d 1221 (2009) (internal citation omitted).

Although questions of law are reviewed de novo, a reviewing court will accord “substantial weight to the agency’s interpretation of the law it administers-especially when the issue falls within the agency’s expertise.” *Kelly v. State*, 144 Wn. App. 91, 96, 181 P.3d 871 (2008).

V. ARGUMENT

A. Appellate Review Of The Property Tax Assessments For 2008, 2009, And 2010 Is Barred By The Doctrine Of *Res Judicata* Or Claim Preclusion

The Strands’ claims regarding the 2008, 2009, and 2010 assessments are precluded under the doctrine of *res judicata*. A party may

not re-litigate issues already adjudicated in a final order. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). *Res judicata* or claim preclusion applies where 1) the parties are identical; 2) the judgment or order in the prior action was rendered by an entity with jurisdiction; 3) the prior action was concluded with a final judgment or order; and 4) the same claim or cause of action is involved in both actions. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001), *cert. denied*, *Sartori v. Lee.*, 534 U.S. 927 (2001).

These elements are met here. The parties are identical: the Spokane County Assessor issued tax assessments for 2008, 2009, and 2010 for the same real property owned by the Strands as in the 2013 assessment which is the subject of this appeal. In the prior actions, final orders were issued by the Spokane County Superior Court for the Strands' appeals of their 2008 and 2010 tax assessments, and by this Court in their appeal of their 2009 tax assessment. CP 721, *Strand v. Spokane County Assessor*, Spokane County Superior Court, Cause No. 10-2-02730-5 (December 3, 2010); CP 786, *Strand v. Spokane County Assessor*, Spokane County Superior Court, Cause No. 13-2-04976-1 (January 27, 2014); CP 758, *Strand v. Spokane County Assessor*, No. 31340-9, 2013 WL 6200166 (Wash. Ct. App. November 26, 2013) (unpublished). Both the Spokane County

Superior Court and this Court acted within the jurisdiction granted under the APA for judicial and appellate review of agency orders. RCW 34.05.570. The Strands seek to relitigate the same causes of action as were brought in the 2008, 2009, and 2010 appeals, raising claims upon which courts of competent jurisdiction have already issued final orders. *Id.*

B. Appellate Review Of The Property Tax Assessments For 2011, 2012, 2014, And 2016 Is Barred Because The Strands Failed To Exhaust Administrative Remedies

The Strands failed to exhaust administrative remedies regarding their 2011, 2012, 2014, and 2016 tax assessments. Under the APA, a party seeking judicial review of an agency order must exhaust “all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review”. RCW 34.05.534. A party aggrieved by a county property assessment can appeal to the county BOE. RCW 84.48.065, .150; WAC 458-14-056. A party aggrieved by a BOE determination can in turn file an appeal with the Washington State BTA. RCW 82.03.130. If dissatisfied with the decision of the BTA, the aggrieved party can request review of an initial order by the BTA. RCW 34.05.464. A party can also request reconsideration of a final agency order. RCW 34.05.470. Only after exhausting administrative remedies with the BOE and the BTA can a party file a petition for judicial review in Superior Court. Neither a request for

review of an initial order, nor request for reconsideration of a final order are prerequisites to filing a petition for judicial review. *Id.*

The Strands did not appeal the Spokane County Assessor's property tax assessments for 2011, 2012, or 2014 to either the BOE or the BTA. CP 688. Therefore, those tax assessments are final. The Strands did, however, appeal their 2015 and 2016 assessments to the BOE, but only further appealed the 2015 assessment to the BTA. *Id.* The 2015 tax assessment is still pending before the BTA. CP 646; *Strand v. Board of Tax Appeals*, Docket 16-070. Because the Strands did not appeal the 2016 assessment to the BTA, that tax assessment is also final. The Strands cannot now ask either the Superior Court or this Court to adjudicate on appellate review the assessments for those years in which they have failed to exhaust administrative remedies.

Further, the Washington Supreme Court has established that agency orders that are not timely protested or appealed are entitled to the same *res judicata* effect as court orders. *Marley v. Department of Labor and Industries of State*, 125 Wn.2d 533 (1994). The unappealed assessments for 2011, 2012, 2014, and 2016 are final and binding upon the Strands, and upon Spokane County. Therefore, this Court should reject the Strands' attempt to have this Court adjudicate their claims relating to the 2011, 2012, 2014, and 2016 tax assessments.

C. The Strands' Appeal Regarding Their 2013 Tax Assessment Is Now Moot

The Strands' alleged in their petition for review that the BTA failed in its duty to provide a complete administrative real property appeal because the BTA failed to issue a decision as to their 2103 tax assessment. CP 2. The BTA issued its Initial Decision on May 9, 2017, which was then followed by the issuance of a Final Order on May 29, 2017.

Mootness can arise at any stage of litigation, including appeal. *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *Martin v. Municipality of Metropolitan Seattle*, 90 Wn.2d 39, 40-42, 578 P.2d 525 (1978). “Issues are moot when the court can no longer provide effective relief and only abstract questions remain.” *In re Detention of Williams*, 106 Wn. App. 85, 99, 22 P.3d 283 (2001) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). *See also* RAP 18.9(c): “[t]he appellate court will, on motion of a party, dismiss review of a case ... if the application for review is ...moot....”

The Strands have already received the relief they sought in their petition for review – the issuance of a decision by the BTA in their 2013 tax assessment appeal. Because this Court can no longer provide effective relief, the Strands' claim should be denied as moot. *In re Rebecca K.*, 101 Wn. App. 309, 313, 2 P.3d 501 (2000).

D. The Merits Of The BTA Order In The 2013 Assessment Appeal Were Not Appealed And Are Not Under Review By This Court

As noted, the relief sought by the Strands in their petition for judicial review was for the BTA to issue a decision regarding their appeal of the Assessor's 2013 tax assessment. CP 1. The BTA issued its Initial Order in that matter on May 9, 2017 and it became final on May 29, 2017. CP 643. The Strands did not seek judicial review of the merits of that order, and the time period in which to seek such judicial review closed on June 28, 2017. CP 646. The order in BTA Docket 13-179 is now final and binding. Further review of that Final Order is barred by the Strands' failure to exhaust administrative remedies. RCW 34.05.534.

E. The Strands' Appeal Of Their 2015 Property Tax Assessment Is Still Pending Before The BTA, And Therefore Is Not Ripe For Review

The Strands have a pending appeal of their 2015 property assessment currently before the BTA. CP 688; Board of Tax Appeals Docket No. 16-070. A hearing has not yet been held by the BTA in that appeal, and there is no administrative record and no initial or final order at this time. The Strands have asked this Court to address their 2015 property assessment. Brief of Appellant, 2, 42.

RCW 34.05.574 states, in part: "In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has

exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” The Washington Supreme Court has ruled similarly that in a judicial review of an agency action, the court may not usurp the discretion vested in the agency by the legislature. *Boeing Co. v. Gelman*, 102 Wn. App. 862, 871-72, 10 P.3d 475 (2000).

The legislature has vested in the BTA the authority to review assessed real property values for purposes of taxation. RCW 84.08.130. Where an appeal of a property assessment is still pending before the BTA, it would be inappropriate for the Superior Court or for this Court to usurp the BTA’s authority.

Further, this Court does not have before it the evidence and record necessary to decide the appeal of the Strands’ 2015 assessment, as there is no administrative record of fact finding yet created by the BTA. This Court should decline to adjudicate the Strands’ claim relating to its 2015 tax assessment.

F. Other Prayers For Relief Were Neither Raised At The BTA Nor In Superior Court, And Thus Cannot Be Properly Raised On Appeal

The Strands request this Court to take action on numerous issues which were not raised in the Superior Court. Appellant’s Brief, at 2-3. In their brief, pertaining to the assignment of error as to the BTA, the Strands

do not address any of the Findings of Fact, Conclusions of Law, nor the Final Order issued by the Spokane County Superior Court. Instead, the Strands variously assert that the BTA violated its own standards of review in appeal of the Assessor's values for tax assessment years 2008 through 2013, that the BTA ignored new evidence in their appeal of the 2013 tax assessment, and that the BTA violated their standards of review for assessment years 2008 through 2013 by ignoring new evidence. Brief of Appellant at 33, 38.

In the Strands' superior court petition for judicial review, they argued a failure of duty by the BTA and numerous shortcomings by the Spokane County Assessor solely in connection with the 2013 tax assessment. The Strands now ask this Court not only to rule on assessments for eight other years not addressed in their Superior Court complaint, but also ask the Court to issue numerous injunctions and mandates to other state and county agencies where no such prayer for relief was sought in the superior court, nor did that court order such relief.

RCW 34.05.554 ("Limitation on new issues") states clearly that "issues not raised before the agency may not be raised on appeal" except under specific, enumerated circumstances which are not applicable to this appeal. Likewise, RAP 2.5(a) states that "the appellate court may refuse to review any claim of error which was not raised in the trial court." The

Strands' attempt to introduce new causes of action and new issues at this stage in their appeal violates both the Administrative Procedure Act and the Rules of Appellate Procedure. The Strands' newly-raised issues and arguments are beyond the proper scope of this Court's appellate review and should be rejected.

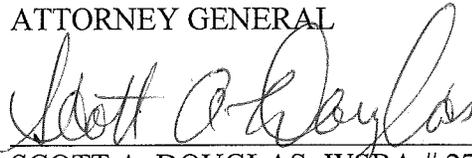
VI. CONCLUSION

The Strands' appeal before this Court alleged that the BTA failed to issue a decision as to the Strands' 2013 tax assessment. The BTA, however, issued their initial decision on May 9, 2017, and that initial decision became a final order on May 29, 2017. Therefore, there is no more relief this Court can provide to the Strands, and that claim should be denied as moot. Further, the Strands' attempt to have this Court adjudicate their claims relating to seven other tax assessment years would either be barred by the doctrine of *res judicata* and claim preclusion or barred by the Strands' failure to exhaust administrative remedies. The Strands' request to have this Court adjudicate the 2015 tax assessment also must be rejected, because no decision has been issued yet by the BTA regarding the 2015 assessment, and thus this Court's review regarding that issue is not yet ripe. The other issues and causes of action which the Strands assert for the first time in this Court were not raised in the superior court or at the BTA, and are beyond this Court's scope of appellate review. Because there is no issue properly

on appeal before this Court, the Final Order of the Spokane County Superior Court should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of March, 2018.

ROBERT W. FERGUSON
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Scott A. Douglas", written over a horizontal line.

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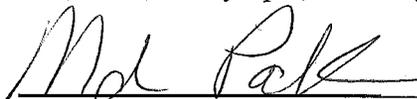
Respondents.

CERTIFICATE OF
SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on March 29, 2018, I served a true and correct copy of the *Brief of Respondent Washington State Board of Tax Appeals* and this *Certificate of Service* by e-mail and by placing same in the U.S. mail via state Consolidated Mail Service to:

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MARTHA PARKER,
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